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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1525

ALUMINUM COMPANY OF AMERICA, ET AL,
Petitioners,

v.

WOODS EXPLORATION & PRODUCING COMPANY, INC., ET AL,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOHN LEROY JEFFERS
First City National Bank Building
Houston, Texas 77002

Attorney for Petitioners Aluminum Company of America, Crown Central Petroleum Corporation, Lavaca Pipeline Company

Of Counsel:

ROSS N. STERLING
CHARLES T. NEWTON, JR.
DAVID T. HEDGES, JR.

VINSON, ELKINS, SEARLS, CONNALLY & SMITH
First City National Bank Building
Houston, Texas 77002

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OPINIONS BELOW

The opinion and judgment of which review is sought in this antitrust treble damage action is *Woods Exploration & Producing Company, Inc., et al* v. *Aluminum Company of America, et al,* Nos. 72-2792, and 73-1633, in which the Slip Opinion and judgment were dated March 13, 1975. (Appendix 107) This opinion and judgment affirmed two separate judgments independently appealed and briefed but consolidated for oral argument. The consolidated appeals were each separately affirmed in the single opinion and judgment issued in No. 72-2792 and on April 24, 1975, a Petition for Rehearing therein was denied. (Appendix 129)

Judgment was originally entered for the defendants, the petitioners here, by the granting of a partial summary

judgment in *Woods Exploration & Producing Company, Inc.* v. *Aluminum Company of America,* 284 F. Supp. 582 (S. D. Tex. 1968), (Appendix 1) and thereafter, the trial judge rendered judgment for the defendants on the remainder of the case notwithstanding the jury verdict in *Woods Exploration & Producing Company, Inc.* v. *Aluminum Company of America,* 304 F. Supp. 845 (S. D. Tex. 1969). (Appendix 25) Thereafter, these judgments were reversed and remanded by the Court of Appeals in *Woods Exploration & Producing Co., Inc.* v. *Aluminum Company of America,* 5th Cir., 1971, 438 F. 2d 1286 (cert. denied) 1972, 404 U.S. 1047. (Appendix 38)

After the reversal of the judgment in favor of these petitioners, a different trial judge trifurcated the case which had been held to be a suit on one cause of action by the Court of Appeals in *Woods Exploration & Producing Co., Inc.* v. *Aluminum Company of America,* 438 F. 2d 1286, *supra,* in order to avoid the four-year bar of the statute of limitations contained in Section 4 (b) of the Clayton Act, 15 U.S.C.A. § 15. After the trifurcation, the plaintiffs totally abandoned the portion of the case upon which the action was solely predicated for more than four years after its filing and as to which partial summary judgment had been granted to defendants, i.e., the alleged combination between the defendants to make false forecasts of market demand for gas from the Carancahua Field in Jackson County, Texas, to the Railroad Commission of Texas. This part of the supposed single cause of action as to which the trial court had granted summary judgment under the doctrine of *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961), and *United Mine Workers* v. *Pennington,* 381 U.S. 657 (1965), was dismissed with prejudice. The new trial judge then eentered judgment for

the plaintiff based on the jury verdict at the first trial on the second splinter of the now fragmented case, which involved a gas pipeline only, for the amount of damages found therefor by the first jury trebled. From this, the Defendants as Petitioners took appeal to the Court of Appeals in Cause No. 72-2792.

Thereafter, the new trial judge then conducted a separate jury trial on the third splinter of the supposed single cause of action, which involved solely a gasoline extraction plant. Appeal was taken from the adverse judgment entered on a jury verdict against Petitioners on this splinter of the case in No. 73-1633. After oral argument before the Court of Appeals of 72-2792, it was ordered consolidated with 73-1633 and reargument ordered in the consolidated cases. This reargument occurred on December 4, 1973; and on March 13, 1975, the Slip Opinion and the judgment affirming both cases were issued.

A copy of the opinion of the Court of Appeals in the consolidated cases, the judgment therein and the denial of the Petition for Rehearing thereof are all printed as parts of a separate Appendix which, due to the length of the opinion and related matters, has been prepared and filed herewith pursuant to Rule 23(i) of this Court. The one opinion written by the District Court on the second of the two judgments in this case now attacked, together with the two District Court opinions of the first trial judge and the prior Court of Appeals opinion in this case, are also printed in the separate Appendix.

Although not strictly "companion cases," three decisions by the Supreme Court of Texas between these same parties involving essentially the same controversy are such an integral part of the controversy between the parties and so

essential to an understanding and an evaluation of the issues involved, that such opinions are also reproduced as a part of the separate Appendix. *Railroad Commission* v. *Woods Exploration & Producing Co., Inc.,* 405 S.W.2d 313 (Tex. 1966), Appendix p. 130; *Railroad Commission* v. *Aluminum Company of America,* 380 S.W.2d 599 (Tex. 1964), Appendix, p. 164; *Benz-Stoddard* v. *Aluminum Company of America,* 368 S.W.2d 94 (Tex. 1963), Appendix p. 173.

GROUNDS OF JURISDICTION

The opinion and the judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed were dated and entered on March 13, 1975. A Petition for Rehearing En Banc was denied by order dated and entered on May 7, 1975. No extension of time for the filing of this petition has been sought. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Whether prejudicial error denying Petitioners that fair trial and due process of law guaranteed by Amendment V to the Constitution of the United States was committed by the trial court in the second jury trial in twice reading to the jury and in permitting extensive argument and comment by Respondents' counsel upon the adverse verdict returned against the Petitioners by another jury in a prior trial of the same cause of action.

2. Whether this case held to be upon one cause of action could nevertheless be fragmented into three parts and a partial, final judgment entered on one segment of the single cause of action under Rule 54(b) of the Federal Rules of Civil Procedure.

3. Whether this case held to be upon a single cause of action could nevertheless be trifurcated with one resulting splinter thereof being dismissed with prejudice and with separate judgments for separate amounts being entered on two separate jury verdicts returned in two separate trials of the other two splinters of the single cause of action, in the second of which the trial court bound the Defendants by the first jury's finding of a Section 2 Sherman Act violation and prohibited the trial therein of the liability or anti-trust violation issue.

4. Whether Petitioners have been accorded that fair trial and that due process of law guaranteed to them by the Constitution of the United States, when though there have been two trials of two different parts of a single cause of action before two different juries and two judgments entered thereon, there was excluded from the trial of each case and Petitioners were denied the right to introduce in evidence before either jury the fact that the Plaintiffs-Respondents had drained and confiscated vast quantities of gas from under Petitioners' lands and had thereby produced more gas from their tiny percentage of the total acreage than Petitioners had been able to produce from this acreage of which they were convicted of having obtained a Section 2 Sherman Act monopoly.

5. Whether Petitioners have been accorded that jury trial and that due process of law guaranteed to them by the Seventh and Fifth Amendments to the Constitution of the United States when they have not been permitted to develop before any jury the most relevant and compelling fact of the entire controversy, i.e., the drainage and confiscation of vast quantities of Petitioners' gas by Respondents from the gas field as to which Petitioners have been convicted of a Section 2 Sherman Act monopoly.

6. Whether the trial court in the second trial committed irremediable error and violated Rule 49 of the Federal Rules of Civil Procedure in instructing the jury that if they found Petitioners combined to file state court lawsuits against Defendants in bad faith and for harassment, such would be unlawful; because such instruction strips Petitioners of the protection of the *Noerr* and *Pennington* rules of this Court when the trial judge at the first trial had made an unreversed finding that such actions were filed in good faith and when no issue of antitrust law violation was submitted to or permitted to be passed upon by the jury.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Plaintiffs-Respondents brought this action under Sections 1 and 2 of the Sherman Act 15, U.S.C. §§ 1 and 2;

Section 1:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *"

Section 2:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor * * *"

and Section 4 of the Clayton Act, 15 U.S.C. § 15;

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and in the cost of suit, including a reasonable attorney's fee."

Other provisions and statutes involved are Section 4B of the Clayton Act, 15 U.S.C. § 15b;

> "Any action to enforce any cause of action under Section 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued;"

and Art. 6008, Tex. Rev. Civ. Stat. Ann., governing regulation of production of natural gas by the Railroad Commission of Texas, pertinent provisions of which are separately published in the separate Appendix filed herewith at p. 180.

Also involved is that part of Amendment V of the Constitution of the United States providing:

> "No person * * * shall be deprived of life, liberty, or property, without due process of law * * *."

Petitioners-Defendants also have invoked Amendment VII to the Constitution of the United States providing:

> "In Suits of Common Law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the Common Law."

STATEMENT OF THE CASE

Review is sought of two separate judgments rendered for the respondents as plaintiffs on the basis of two separate jury verdicts returned in two separate jury trials on what was held to be a single antitrust treble damage cause of action.* The second jury was told twice by the judge and

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* Petitioners here and defendants below are Aluminum Company of America (Alcoa), Lavaca Pipeline Company (Alcoa's wholly owned subsidiary), and Crown Central Petroleum Corporation (Crown). Respondents here and plaintiffs below are Stanley C. Woods and two corporations owned by Woods and his wife — Woods Exploration & Producing Co. Inc. and Southeastern Pipeline Company.

repeatedly by Respondents' counsel of the first jury's verdict against Alcoa, et al, the Petitioners. However, there was concealed from both juries the most salient and probative evidence in existence on the Section 2 Sherman Act monopoly of which Petitioners, Alcoa, et al, were convicted — the drainage and expropriation from them by Respondents, Woods, et al, of enormous quantities of Petitioners' gas from the very Appling Gas Field in Jackson County, Texas, which was held to be the subject matter of Petitioners' monopoly.

In the first of these cases, after Court of Appeals reversal of initial judgment for defendants Alcoa et al, judgment for treble the amount of damages found in the verdict, or a total of $429,777.00, was rendered by the second trial judge for the Respondent gas drainers against the Petitioners whose gas was drained. In the second trial in which the first trial verdict was perpetually paraded by judge and counsel alike before the jury, judgment was entered for treble the amount of the damages found in the verdict for $1,056,669.12 plus interest and plus $300,000.00 in attorneys' fees — again in favor of the gas confiscators against those whose gas was confiscated.

The litigation essentially involves the long-standing legal controversy between large-tract and small-tract owners as to their fair share of oil or gas production from common reservoirs. *See Hardwicke* and *Woodward, Fair Share and the Small Tract in Texas,* 41 Texas L. Rev. 75, in which the authors at 76 summarize the basic law as follows:

> "The Supreme Court of Texas in two recent cases, the *Atlantic* and *Halbouty* cases, held that the Commission, after establishing an allowable for a pool under the oil and gas conservation statutes, must distribute the allowable among the owners of the tracts on which producing wells are located so that each such owner

> is given a reasonable opportunity to produce the recoverable oil and gas in and under his tract or its equivalent in kind. In short, he is to receive his fair share. The Court pointed out that, if one or more owners are given allowables that permit them to produce more than their fair shares, the excess must necessarily be drained from the tracts of those who are denied such opportunity. Since this results in a taking or a confiscation of their property, such an allocation order is invalid."

In reliance on these cases, the Petitioners sought, through the Railroad Commission of Texas, the regulatory agency which has pervasive regulatory authority over controlling drilling for and production of oil and gas in Texas, to prevent the Respondents, Woods, et al, who had drilled numerous gas wells on town lots substantially after the drilling and production of gas wells on 320 acre spacing on leases covering more than 6,000 acres by Petitioners, Alcoa, et al, to prevent the drainage and confiscation of their gas by Respondents and to prevent Respondents from obtaining more than their "fair share" of the gas from the common reservoirs. From this resulted the antitrust treble damage action in which the two judgments of which review is sought were rendered.

Respondents Woods initially filed this antitrust treble damage action complaining solely of alleged combination between the Petitioners, lessees of large tracts, on which they had discovered various gas reservoirs from which they were producing gas primarily for fuel for an aluminum plant, to restrict the production of gas from these same reservoirs by Respondents and other lessees of town lots on which they had drilled gas wells through which they were draining large quantities of gas underlying the leases of Petitioners. It was averred that this combination, alleged to be violative of both Section 1 and Section 2 of the Sher-

man Act, was carried out by means of Petitioners filing greatly understated estimates of market demand for gas from the field with the Texas Railroad Commission, the regulatory body with statutory power to make allocations of the amounts of gas to be produced from the gas field and the various wells therein. The trial court granted partial summary judgment against Respondents under authority of *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965). *Woods Exploration & Producing Co., Inc.* v. *Aluminum Company of America*, 438 F.2d 1286, *supra.*

Respondents as Plaintiffs were thereafter permitted to amend their complaint and to allege for the first time far more than four years after the alleged occurences that violations of Sections 1 and 2 of the Sherman Act consisted of Defendants' combining and conspiring to prevent Plaintiffs-Respondents from transporting their gas and from extracting the liquids therefrom by restraining them from using existing pipelines and requiring them to build their own pipeline at their own expense and by restraining them from building the liquid extraction plant. On the first trial of the case, the trial court excluded the proposed liquid extraction plant from the consideration of the jury as being too remote and too speculative but permitted the case to go to the jury with evidence as to the cost of the construction of the pipeline. The jury found that Petitioners did not conspire to restrain trade in violation of Section 1, but that they did monopolize, or conspire or attempt to monopolize in violation of Section 2, and found damages based upon the cost of the construction by Respondents of their own pipeline. The first trial court granted judgment notwithstanding the verdict in favor of Petitioners. The trial court held that the competition between Petitioners and

Respondents for gas from the common reservoirs conducted under the pervasive regulation of the Railroad Commission of Texas simply did not constitute sufficient evidence of a violation of Section 2 of the Sherman Act to submit to the jury. *Woods Exploration & Producing Company, Inc.* v. *Aluminum Company of America*, 304 F. Supp. 845 (S. D. Tex. 1969) App. 25.

The Court of Appeals reversed both judgments of the trial court and remanded the entire case. In so doing, the Court of Appeals denied Alcoa's plea that the Section 2 Sherman Act violations alleged in connection with the pipeline and the extraction plant were barred by the applicable four-year statute of limitations provision contained in Section 4(b) of the Clayton Act, 15 U.S.C.A. § 15, because the Court of Appeals held that the suit was on a single cause of action based on a conspiracy concerning the production, transportation and sale of gas from the Appling Field and that hence the allegations in an amended complaint concerning the pipeline and the liquid extraction plant, though made far more than four years after the occurrence of the events, related back to the original filing of the suit. *Woods Exploration & Producing Company, Inc.* v. *Aluminum Company of America*, 438 F.2d 1286, 1299-1300 (5th Cir. 1971) App. 38, 60-61.

The new trial judge, Retired Supreme Court Justice Clark, despite the fact that the Court of Appeals had held the case to be upon a single cause of action in order to avoid the limitations bar of Section 4(b) of the Clayton Act, nevertheless entered partial final judgment on the reinstated jury verdict for $429,777.00, three times the amount of damages found by the jury, and treated these damages as relating to the pipeline segment of the case only. He then ordered the case to proceed to trial before

another jury upon the alleged false forecasts of market demand to the Railroad Commission of Texas by Petitioners and the alleged frustration by Petitioners of the erection by Respondents of a liquid extraction plant. Respondents thereupon abandoned the alleged false forecasts segment of the case, which was all the lawsuit was about for more than four years after it was first filed and until after the first trial court had granted partial summary judgment on this issue. The new trial judge then ordered the case to proceed to trial before a new jury on the liquid extraction plant splinter of the case alone, despite Petitioners' protests that under the holding of the Court of Appeals on the Section 4(b) limitations issue, the case on one cause of action could not be fragmented into three separate splinters and a partial final judgment entered on one of them under the strictures of Rule 54(b) of the Federal Rules of Civil Procedure which authorizes such only "when more than one claim for relief is presented in an action."

Furthermore, the new trial judge not only refused to retry the entire case as Petitioners insisted the fact that it was held to be upon a single cause of action necessitated, but, indeed, refused to try liability or antitrust law violation issues at all as to the extraction plant sliver to which the case had now been chiseled down. Instead, the trial judge held that the first jury had established a Section 2 Sherman Act violation embracing the extraction plant as a matter of law and so instructed the jury both on its impanelling and upon final charge to it, in which instances the entire prior jury verdict adverse to the Petitioners was read by the judge to the jurors. This action was taken despite the fact that the extraction plant issue was never submitted to but was expressly excluded from the consideration of the jury by the trial judge at the first trial

and was never before the first jury on the issue of antitrust law violation or otherwise, and despite the fact that the Section 2 violation found by the jury in the first trial was expressly restricted to the "drilling for, producing, and transporting gas from the Appling Field" by the issues submitted to the jury upon which it made its Section 2 violation finding. The extraction plant had not only been excluded from evidence and expressly excluded from the jury's consideration by the instructions of the judge at the first trial, but "extraction" was specifically excluded from the Section 2 violation issue submitted to and found by the jury.

Following the precedent of the first jury verdict, twice read to them by the judge, and extensively argued by counsel for Respondents, the second jury also returned a verdict adverse to Petitioners with damages predicated upon the extraction plant upon which the trial judge entered a second and separate judgment for $1,056,669.12, treble the amount of damages found by the jury from the alleged frustration of the construction of the liquid extraction plant, together with interest and $300,000.00 in attorneys' fees.

In the trial before the second jury, although the trial court had excluded antitrust violations issues from the case and had treated the jury verdict in the prior trial as establishing them as a matter of law in the second trial, he nevertheless instructed the jury in Instruction No. 32 with reference to evidence that Alcoa, et al had filed various state court suits against Respondents in connection with seeking to prevent them from getting permits to drill gas wells on town lots:

> "You are instructed, however, that persons, including corporations, may not combine for the purpose of using governmental agencies and the courts as a means

> to harass and deter competitors in furtherance of their monopoly. Acts which are in themselves legal lose their character when they become constituent elements of an unlawful scheme."

This highly prejudicial and inflammatory instruction was objected to by Petitioners, because it could not possibly be included within the authorization to give "to the jury such explanation and instruction concerning the matters thus submitted as may be necessary to enable the jury to make its findings upon each issue" as provided in Federal Rules of Civil Procedure No. 49 for cases submitted to the jury by the special verdict method.

Petitioners took separate appeals from the two separate judgments. Original submission of the appeal from the first judgment was set aside following discovery in oral argument that an appeal from a second judgment in the same case was on the way to the Court of Appeals. The two appeals were ordered consolidated and were argued together. After more than fifteen months following this second submission, the Court of Appeals handed down an opinion and decision, App. 107, affirming both judgments largely on the grounds that they were necessitated by the first opinion by the Court of Appeals in the original appeal, *Woods Exploration & Producing Company, Inc.* v. *Aluminum Company of America,* 438 F.2d 1286 (5th Cir. 1971), App. 38, which had in effect become "the law of the case." Petition for Rehearing En Banc was filed and denied. App. 129.

REASONS FOR ALLOWING THE WRIT

The decision of the Court of Appeals warrants review on certiorari for several reasons:

I. The action of the trial court in twice reading to the second jury the adverse verdict of the first jury and in permitting counsel for Respondents to argue

> extensively concerning it was so highly improper, inflammatory and unprecedented as to require correction and, indeed, it amounted to a denial to Petitioners of that fair trial and due process of law guaranteed them by Amendment V to the Constitution of the United States.

II. The fragmentation of what had already been determined to be a single antitrust cause of action into three parts, with a partial final judgment being entered in one amount on one jury verdict, and a second judgment being entered in another amount on a second jury verdict, without there ever being a trial of the entire case, constituted such an unprecedented violation of Rule 54(b) of the Federal Rules of Civil Procedure as to require correction and, indeed, amounted to a denial to Petitioners of that fair trial of a single antitrust cause of action guaranteed to them by the Fifth Amendment to the Constitution of the United States. Further, the first jury's findings of antitrust violation being treated as binding as a matter of law upon the second jury before which a trial of liability or antitrust violation issues was denied, constituted such a highly improper and unprecedented procedure as to require correction and, indeed, constituted a denial to Petitioners of that due process of law guaranteed by the Fifth Amendment. It further denied that jury trial guaranteed by the Seventh Amendment to the United States Constitution when a separate judgment was entered on the second jury verdict without there ever having been a jury trial or a jury determination as to the antitrust law violation involved in that segment of the fragmented case, which had been expressly excluded from and not submitted to the first jury, and hence not passed upon by it.

III. The exclusion at both jury trials of two splinters of a single antitrust cause of action of the most probative evidence on the issue of Section 2 Sherman Act monopoly upon which both judgments are based through denial to Petitioners of the development of evidence before either jury of the drainage and expropriation of vast amounts of Petitioners' gas by Respondents from the gas field constituting the subject of the alleged Section 2 monopoly constituted such grossly improper trial procedure as to require correction and, indeed, amounted to a denial to Petitioners of that fair trial and that due process of law guaranteed by the Fifth Amendment and that jury trial of the entire case guaranteed to Petitioners by the Seventh Amendment to the United States Constitution.

IV. The trial court's instruction to the jury that the filing of various state court cases by Petitioners against Respondents could be unlawful constituted such a gross impropriety under Rule 49 of the Federal Rules of Civil Procedure governing instructions in cases submitted on special verdicts as to require correction when no issue of antitrust violation was permitted by the court to be tried by the second jury; when there had been an undisturbed finding at the first trial that such state court actions were filed in good faith; and when the instruction was an incorrect statement of the law in any event.

ARGUMENT

I.

The Exploitation of the First Jury Verdict by Both Trial Court and Counsel Before the Second Jury Was So Highly Inflammatory, Improper and Prejudicial as to Require Review.

In its Memorandum Opinion, the second trial court in fact offered no explanation for its unprecedented and utterly devastating action of stressing the first jury's verdict to the second jury except to state that it had done so and that because Petitioners objected to its reading a part of the first jury's verdict again in its final jury charge that it resolved this issue by reading all of it. The trial court stated:

> "On voir dire at the time of the selection of the jury, the court read to the panel the verdict of the jury at the first trial and advised them of the nature of the case, the respective claims of the parties and their duties as jurors to take the law of the case from the Court and that full and detailed instructions would be given them before they received the case. * * * The Court, in the first draft of the charge, summarized the jury finding at the first trial concerning Defendants' monopolization of the extraction of gas from Appling Field. When the Defendants objected that the characterization was not full and complete, the Court then incorporated the whole verdict in the charge. The Defendants then objected to the whole charge being read. *The case was submitted on the theory that the monopolization charge had been established at the prior trial.*" (Emphasis supplied). (Court of Appeals Appendix, No. 73-1633, Pg. 103).[1]

The opinion of the Court of Appeals is equally devoid of any statement of substantial justification for repeatedly waving the first jury's adverse verdict in the face of the

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[1] Request will be duly made to the clerk of the Fifth Circuit Court to certify and transmit the printed Appendix of the Record in that Court to this Court.

second jury. It simply swept this shabby and shocking procedure deftly under the rug with the following total comment:

> "In this connection, it was not error to instruct the jury as to the verdict reached by the first jury in the original trial of case on the monopolization issue. It was necessary for the jury in the second trial to be informed of the outcome of the prior litigation, since the resolution of the issue before it presumed the earlier findings. The claim that such instruction was error is without merit."

This amazing statement is totally devoid of any support in either reason or authority. No judicial precedent is cited by the trial court or by the Court of Appeals sustaining this highly inflammatory action, because we confidently state that there is none. All discovered judicial expressions on the subject are exactly to the contrary.

There is one situation in which there is express statutory authority for using a verdict and judgment in a prior trial. Section 5 of the Clayton Act permits, under certain circumstances, prior Government judgments to be admitted in evidence in subsequent private suits as prima facie proof of certain issues. Even in those cases where there is express statutory authority for showing a prior verdict and judgment, it is well settled that the verdict may not be utilized where there is no final unappealable judgment. That was precisely the situation in the present case. At the time that the prior verdict was being flaunted before the second jury throughout the second trial, its validity was under attack in an appeal pending in the Court of Appeals and, accordingly, was not final.

The very reason assigned by the trial judge in the second jury trial here to permit the prior verdict to be shown

because it would be helpful to the jury as "background" and in giving them the flavor of the case, (Trial Record 527) was expressly condemned in *International Shoe Machinery Corp.* v. *United States Shoe Machinery Corp.*, 315 F.2d 449 (1st Cir.) *cert. denied*, 375 U.S. 1963. There the Plaintiff's attempt to introduce the prior Government judgment that was not final was excluded, because the court said that in weighing its "probative value" against its "capacity for prejudice," it had to be concluded that its "prejudice quotient" was so high that it outweighed "its legitimate effect" because:

> "Whether admitted purely as 'background' evidence or not, evidence of a judicial determination of prior illegal conduct on the part of the Defendant cannot help but have a great emotive impact on the jury.

As Wigmore states:

> 'The deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught is a tendency which cannot fail to operate with any jury in or out of court.' "

The cases are uniform that even a prior Government judgment cannot be utilized under the limited circumstances of Section 5 of the Clayton Act unless the judgment is final.[2]

Since a prior Government judgment and Section 5 of the Clayton Act was not involved and could not even be

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[2] *See Russ Togs, Inc.* v. *Grinnel Corp.*, 426 F.2d 850 (2d Cir. 1970); *Fifth and Walnut* v. *Loew's, Inc.*, 176 F.2d 587 (2d Cir. 1949); *Fanchon & Marco, Inc.* v. *Paramount Pictures*, 133 F.Supp. 839, 845 (S.D.N.Y. 1955); *De Luxe Theatre Corp.* v. *Balaban & Katz Corp.*, 88 F.Supp. 311 (N.D. Ill. 1950); *Twin Ports Oil Co.* v. *Pure Oil Co.*, 26 F.Supp. 366, 369 (D. Minn. 1939).

relied upon here, it is simply elementary and undisputed that "upon a subsequent trial of a case, it is improper for counsel to disclose to the jury the decision made at a former trial." *Glens Falls Insurance Company* v. *Yarborough,* 396 S.W.2d 200 (Tex. Civ. App. — Waco 1965, writ ref'd n.r.e.); *Looney* v. *Traders and General Ins. Co.*, 231 S.W.2d 735, 737 (Tex. Civ. App. — Fort Worth 1950, writ ref'd n.r.e.).

Even if the trial court in the second trial had been correct in his assumption and instruction to the jury that Alcoa, et al were bound by the prior finding against them of monopolization, as will later be shown to be incorrect, it would, nevertheless, have been totally unnecessary and serve nothing but a purely prejudicial and inflammatory purpose to reveal to the second jury the details of the first jury's verdict and to flaunt it before them repeatedly from both the Bench and the Bar. The jury need only to have been instructed that such a monopolization existed and that they were to so assume in their deliberations, and that they were merely to determine whether Woods was prepared to construct an extraction plant and whether, as a part of Alcoa's monopoly and in furtherance thereof, it prevented its construction. Even Woods' counsel recognized this fact as early as a Pre-trial Conference of February 17, 1972, when asked "what to tell the jury with reference to the prior trial if we tell them anything." Counsel's answer then was:

> "MR. ABLE: Don't need to say a thing. If you do, put it in your instructions that the question of liability has already been decided in a previous trial and you're merely called upon to find the answer to the following issues." (Court of Appeals Appendix No. 73-1633, p. 176)

Justice Clark later recognized at a Pre-trial Conference of October 30, 1972, that even this restricted and guarded

handling of the matter would be irretrievably and incurably injurious, stating then:

> "if you said, as you did evidently think I should, that these Defendants have been found liable on a claim of monopoly, *which would be as light a way as I could put it,* if that was error, why, *that would be so damaging that we wouldn't be able to retrieve it.*" (Court of Appeals Appendix No. 73-1633, p. 199)

Thereafter, instead of handling it in "as light a way," as he "could put it," the trial judge instead read the prior verdict in its entirety to the jury on the voir dire examination, set it out again in its entirety at the very beginning of his charge to the jury (Court of Appeals Appendix No. 73-1633, pp. 77-81); repeatedly told the jury that there was a "monopoly heretofore found to exist to monopolize the trade and commerce of drilling for, producing and transporting gas from the Appling Field" (App., *supra* 82, 83, 88, 90, 96); and permitted the jury to take the written charge containing the full text of the prior jury verdict to the jury room with them and to have access to it throughout their deliberations on the second verdict.

In addition to repeated emphasis on the prior verdict by the trial court, who actually admitted the prior verdict before the second jury for all purposes (Court of Appeals Record, 73-1633, pp. 2174-78, 3811-3816), the judge permitted Woods' counsel to flaunt the prior verdict before the second jury repeatedly and without any restraint (Court of Appeals Record, 73-1633, pp. 4027, 4045-46, 4123, 4129-30, 4139-40).

In essence, the jury was told in every possible way that they should do the same thing to Alcoa, et al as the prior jury had done — that the first jury had made a good start, and that they should finish the job. With this flagrant misuse made of the prior jury's verdict, Petitioners did not

have a remote chance of receiving that fair trial and that due process of law guaranteed to them by Amendment V to the Constitution of the United States, but instead, there was a complete preview of things to come in the trial court's prophetic if indelicate reference to the old Chinese proverb suggesting to counsel for Petitioners during a pre-trial discussion of this issue on October 30, 1972, that he simply "relax and enjoy it." (Court of Appeals Appendix 73-1633, p. 201) All of this was done to Petitioners despite their most desperate efforts to avoid it by Motion in Limine, by extended argument at Pre-trial Conference, by repeated objections during the trial, and by extensive objections to the trial court's charge to the jury on the issue. Petitioners have been stripped of any protection from the most invidious and insidious kind of prejudice unless that protection now be accorded by the Supreme Court of the United States.

II.

Fragmentation of a Single Cause of Action Into Separate Parts With Two Separate Judgments For Two Separate Penal Amounts Predicated Upon Two Separate Jury Verdicts is Impermissible Under Rule 54(b) of the Federal Rules of Civil Procedure or Otherwise.

The Section 2 Sherman Act amended complaint complaining about the alleged frustration of use of the Lumar pipeline and participation in construction of the Lumar extraction plant admittedly occurred long after the expiration of four years following the claimed occurrence of these events. Nevertheless, the Court of Appeals in *Woods Exploration & Producing Co.* v. *Aluminum Co. of America, supra,* at 438 F.2d 1286, 1300, held that the four-year limitations bar contained in 15 U.S.C.A. § 15(b) did not apply,

because these events referred to "the same transaction or occurrence." In other words, they were held to be a part of the same and single cause of action because 15 U.S.C.A. § 15(b) specifically requires that:

> "Any action *to enforce any cause of action* under § 15 or § 15(a) of this title shall be forever barred unless commenced within four years *after the cause of action accrued.*" (emphasis supplied)

Only because the Section 2 complaint about the pipeline and the extraction plant was held a part of the same "cause of Action" as the original Section 1 Sherman Act complaint about the alleged false market demand forecast to the Railroad Commission of Texas could they escape the mandatory four-year limitations bar of 15 U.S.C.A. § 15(b).

When the pipeline segment of the case was held to be a part of the same cause of action as the false market demand forecast segment originally sued upon, it could not, as a matter of law, be made the basis of a separate partial final judgment under governing Rule 54(b) of the Federal Rules of Civil Procedure which expressly limits partial final judgments as here involved to situations "When more than one claim for relief is presented in an action, * * * the court may direct the entry of a final judgment as to one or more but fewer than all of the claims * * *." It is judicially settled that "more than one claim" means more than one "cause of action under common law pleading." *King* v. *California Co.,* 236 F.2d 413, 414 (5th Cir. 1956); *Gottesman* v. *General Motors Corp.,* 401 F.2d 510, 512 (2nd Cir. 1968); *Cott Beverage Corp.* v. *Canada Dry Gingerale, Inc.,* 243 F.2d 795 (2nd Cir. 1957); *Rieser* v. *Baltimore & Ohio R.R. Co.,* 224 F.2d 198, 199.

The trial judge at the second trial expressly recognized that under the Court of Appeals holding there was necessarily only a single cause of action, stating that he had

entered partial final judgment for the pipeline damages only based on the first jury verdict "not thinking that there would be three different causes of action, because I think you are right on that, because if we say it is three different causes of action, why, certainly limitations would bar the extraction of liquids." (Court of Appeals Appendix 73-1633, p. 193-194) The trial judge merely gave the judicial shrug to Rule 54(b)'s strict confinement of partial final judgments to one or more of multiple causes of action sued upon on the ground that the Court of Appeals at 438 F.2d 1316 had inserted a dictum that "the trial court may, if it wishes, render a partial final judgment under Fed. R. Civ.P. 54." This reasoning ignored the fact that the Court of Appeals did not mandate the entry of a partial final judgment in its dictum and that when the Supreme Court denied Petition for Certiorari in that case, no such partial final judgment had in fact been entered.

The truth is inescapable that Rule 54 does not permit, but expressly precludes, the entry of a partial final judgment on a splinter of an admittedly single cause of action as was done here. The resulting anachronism of two separate judgments for two separate amounts of damages based upon two separate jury verdicts on a single cause of action not only contravenes Rule 54, but violates proper judicial administration in a very fundamental way and should be corrected by the Supreme Court of the United States.

The maladministration of this particular case is underscored by the fact that the second trial court, after entering partial final judgment on the first verdict, bound Petitioners Alcoa, et al in the second trial on the extraction plant splinter of the case by the Section 2 Sherman Act monopolization finding made in the first case as to the pipeline segment. Retrial of the liability issue of anti-trust

violation was strictly prohibited in the second case. The jury was told instead that the Petitioners came into the case as convicted law violators, and that they were to judge them accordingly. This amazing judicial course was taken despite all of the following:

(1) The Court of Appeals expressly stated on Petition for Rehearing following the first trial, the following:

> "Appellees' argument to the contrary notwithstanding, we think our opinion clearly states that the trial on remand with regard to the alleged filing of false nomination forecasts *shall encompass all those issues which are associated with antitrust actions.*" (Emphasis Supplied). Appendix 96.

No reason, rational or otherwise, has been advanced as to why a trial on "false nomination forecasts" would "encompass all those issues which are associated with antitrust actions," but a trial on the liquid extraction plant would not. Neither the false nominations issue nor the liquid extraction plant issue was ever heard by, submitted to or passed upon by the jury at the first trial. The evidence as to both was excluded at the first trial, and the jury was expressly instructed not to consider the liquid extraction plant for any purpose.

(2) The second trial judge expressly recognized at the Pre-trial Conference of May 31, 1972 that the extraction plant issue was totally excluded and simply was not tried in any part at the first trial, Justice Clark stating with reference to Judge Singleton's charge at the first trial:

> "It says that you are instructed that the matter of the proposed gas extraction plant on the Lumar Gas Corporation pipeline, or any proposed interest of the Plantiffs, or any one of them, have been excluded from the case and you shall not consider nor give any weight

whatsoever to any testimony or evidence relating to this matter, nor consider it in any way in connection with the deliberation of damages.

Damages is just part of it. He has got a very broad statement there that appears to carve out, to me — particularly since your citation doesn't have any reference to the pipeline — to the extraction plant — it seems to carve out the extraction plant.

MR. ABLE: Well, you may be right, Your Honor." (Court of Appeals Appendix 73-1633, p.186)

(3) It is undisputed that the first trial court not only, by specific instruction quoted by the second trial judge above, excluded the extraction plant from any consideration by the jury, but that no issue of Section 2 Sherman Act conspiracy covering a liquid extraction plant was submitted to or found by the jury. The issue submitted to and the finding made by the first trial jury on Section 2 Sherman Act monopoly were as follows:

"Question No. 2

Did Alcoa and Crown monopolize or attempt to monopolize or conspire with F. E. Appling, Carl E. Siegesmund, or Houston Pipe Line Company, or any of them, or either of them, to monopolize any appreciable part of the trade and commerce of *drilling for, producing, and transporting gas from the Appling Field?* (Emphasis Supplied)

Answer: Yes."[3]

(4) Both the second trial judge and counsel for Woods initially recognized at the Pre-trial Conference of May 31, 1972 that there had been no jury finding of monopoly as to extraction at the first trial as demonstrated by the following colloquy between Court and counsel:

[3] The complete jury verdicts in both the first and second trials are reproduced as a Supplement at the end of this Petition.

"MR. MANDELL: The jury finding does not have the extraction plant.

THE COURT: No.
MR. MANDELL: No, sir.
THE COURT: Since that is taken out —
MR. MANDELL: That's correct, it was taken out.
THE COURT: How did they pass on it, then?
MR. MANDELL: But they did find a monopoly.
THE COURT: Not on extraction.
MR. MANDELL: No, sir, not on the extraction.
THE COURT: Well, that's all that is involved here is the extraction."
(Court of Appeals Appendix 73-1633, p. 189)

The second trial judge thereafter reversed himself and took the view that the submission of "transportation" of gas to the jury could also have included "extraction of liquids." How could either Justice Clark, as the second trial judge, or Judge Simpson, writing the opinion for the Court of Appeals of which review is sought, possibly reason that Section 2 antitrust conspiracy had been adjudicated as to extraction of liquids in the first trial when the first trial judge not only excluded all evidence as to the extraction plant, expressly instructed the jury that they were not to consider the extraction plant for any purpose but specifically omitted "extraction of liquids" from the issue submitted to the jury on "drilling for, producing and transporting gas?" Both simply gave it the judicial brushoff on the finding that the first Court of Appeals opinion had "remanded for retrial only on the issue of damages flowing from the interference with the proposed extraction plant." App. 112. The Court of Appeals opinion states again:

"The issue on remand was properly limited to the issue of damages flowing from the Alcoa Appellants' alleged interference with the construction of the liquids extraction plant through their concerted activity." (App. 121).

(5) Both Justice Clark and Justice Simpson in effect simply treat this as the "law of the case" flowing from the first Court of Appeals' opinion. They do so in the teeth of the clear, uncontroverted record that the extraction plant evidence and issue were never submitted to nor passed upon by the first jury. Judge Singleton at the Pre-trial Conference of February 17, 1972 concluded "I still have to try the issue of monopoly or monopolization," (Court of Appeals Appendix, *supra,* 176) and Justice Clark initially agreed at the Pre-trial Conference of May 31, 1972. (Court of Appeals Appendix, *supra,* 186, 189-190). He put it most plainly at p. 191 when he said: (referring to Judge Singleton) "Since he took it away from them and since there is no finding on it, I just can't see how we can assume there is a finding."

At 192 he stated: "It is a non sequitur, it apears to me, to tell the jury that they have already been found guilty of monopoly in production and transportation and you are to find whether, as a result of that, that monopoly in transportation and production of extraction has been prevented."

> "MR. MANDELL: That's correct, Your Honor.
>
> THE COURT: That's an entirely different problem than the other. It doesn't look like to me, unless you are going to say there was one over-all conspiracy in which this was a facet or an overt act, of course, you could try it on that basis and say that, but then, *you run into the problem that the jury didn't pass on the extraction.*" (Emphasis Supplied)

It is manifestly clear on any fair view of this record that Petitioners have never had their day in court on an antitrust liability issue — on a Section 2 Sherman Act monopolization issue — related to the extraction of liquids from the natural gas through an extraction plant. They have never introduced their evidence, been heard on or had a jury consideration or finding on that issue. Yet, a second

and separate judgment for $1,056,669.12 plus interest and $300,000.00 in attorneys' fees has been rendered against them upon it. They have been denied that due process of law guaranteed to them by the Fifth Amendment to the Constitution of the United States and that jury trial of the antitrust violation and liability issues as to the extraction plant guaranteed to them by Amendment VII to the Constitution of the United States.

III.

Petitioners Have Been Denied Development At Either Jury Trial of the Most Probative Evidence on Antitrust Monopolization and Damages in the Form of Proof of Drainage of Vast Quantities of Their Gas by Respondents.

At the first trial, Alcoa, et al were denied all their tenders of evidence on the uncontroverted fact that Woods had continuously drained vast quantities of Alcoa's gas from underneath Alcoa's leases on the theory that this evidence related only to the alleged false market demand forecasts as to which the trial court had granted summary judgment for the Defendants. When the case came on for trial after remand, Woods totally abandoned this part of his lawsuit, which was all that it was about during the first four to five years of its pendency, for the obvious tactical purpose of seeking to exclude the drainage evidence at the second trial. Justice Clark dismissed this phase of the case with prejudice, (Court of Appeals Appendix, *supra,* 1) although he expressed the view at the May 31, 1972 Pre-trial Conference that it was "somewhat fantastic" that while the Supreme Court of Texas would hold that while Woods was guilty of drainage of Aloca's gas which was not their property, "still there is no right" (Court of

Appeals Appendix, *supra,* 185). Justice Clark nevertheless excluded any substantial development of this evidence at the trial. Hence, the trial upon which the second judgment was based was one in which Defendants' exhibits 48-50, 53-69, which fully developed the facts of the vast amount of drainage of Alcoa's gas by Woods and the production of more gas from Appling Field, the subject matter of the alleged antitrust monopoly, by Woods and his counterparts than by Alcoa, were excluded.

At the trial on which the first partial final judgment was entered, the court excluded undisputed facts previously found by the Texas Supreme Court in two decisions involving the same parties and the same basic transactions and controversies as are involved here. In the first, *Railroad Commission* v. *Aluminum Co. of America,* 380 S.W.2d 599 (Tex. 1964), App. 164 the Texas Supreme Court found that the allegations that the orders of the Railroad Commission of Texas "permits enormous drainage to town lot and other small-tract wells from under Respondents' lands" and "that the average per-well allowable for the small tracts is forty-three times the average per-acre allowable for standard unit tracts," constitute "allegations which are proven without substantial dispute." The court had previously held the one-third — two-thirds allocation formula utilized by the Railroad Commission of Texas bringing about such results to be confiscatory and invalid in the cases of *Atlantic Refining Co.* v. *Railroad Commission of Texas,* 346 S.W.2d 801 (Tex. 1961), and *Railroad Commission of Texas* v. *Shell Oil Co.,* 380 S.W.2d 556 (Tex. 1964), but it held that Alcoa could not take advantage of the fact that the formula was confiscatory and invalid in its case also, because it had been guilty of *laches* in attacking the validity of the formula.

The Texas Supreme Court had also held in *Railroad Commission* v. *Woods Exploration & Producing Co.,* 405 S.W.2d 313 (Tex. 1966), again found in this same controversy between these same parties involving this same gas field, that another Railroad Commission of Texas regulation, Statewide Rule 31, resulted as follows:

> "This enabled the latter to produce far more of the reservoir allowable than their share as determined by the basic one-third — two-thirds allocation formula, and the drainage advantage which the small-tract operators already enjoyed by virtue of the formula itself was thus substantially enhanced." (App. 134).

The introduction of these Supreme Court opinions and the development of the underlying facts upon which they were based were all excluded at the first trial upon which the first judgment is based, although this evidence obviously constituted the most probative evidence in existence on whether Alcoa, et al, were guilty of a Section 2 Sherman Act monopoly violation as to the Appling Field, from which Alcoa's gas was being drained by Woods and the other town lot operators, in quantities greater than Alcoa was able to produce therefrom, as well as to the issue of damages.

Accordingly, Alcoa, et al are in the grim and ghastly position of having two separate heavy antitrust penalty judgments imposed upon them at two separate trials before two separate juries without having been permitted at either trial to develop the most probative, salient and persuasive evidence in existence on the governing liability issue, i.e., that the Woods Respondents over a long period of time, had drained and confiscated vast quantities of their gas from under their lands in a manner which would be unlawful but for *laches* and, in fact, had been able to produce more gas from the gas field which was the subject matter of

the alleged monopoly than had Alcoa and its Co-defendants. There glares out of the record the fact that the Petitioners have been, despite two jury verdicts and two judgments, denied any one jury trial in which they were permitted to try their whole case and develop their whole most probative and persuasive evidence. Judgments imposed under these circumstances constitute a denial of fair trial and due process of law under Amendment V and the denial of that full jury trial to which Petitioners are entitled under Amendment VII to the Constitution of the United States.

IV.

The Second Trial Court Violated Both Federal Rule of Civil Procedure 49 and Fundamental Fairness in its Special Jury Instruction on State Court Lawsuits Filed by Petitioners Against Respondents.

At the second trial, the jury was told over Petitioners' objections as a part of Instruction 32 of the charge of the court dealing with certain state court lawsuits filed by Petitioners against Respondents, in part, as follows:

> "You are instructed that under the Antitrust laws, individual action taken by Defendants before the Railroad Commission of Texas and in the courts cannot be considered as evidence against them. A person individually is privileged under the United States Constitution to take any and all such action. *You are instructed, however, that persons, including corporations, may not combine for the purpose of using Governmental agencies and the courts as a means to harass and deter competitors in furtherance of their monopoly. Acts which are in themselves legal lose their character when they become constituent elements of an unlawful scheme.*" (Emphasis Supplied) (Court of Appeals Appendix, *supra,* 95).

This instruction was given despite the fact that the trial court had already twice put the previous jury verdict convicting Petitioners of Section 2 Sherman Act monopoly before the jury and had charged them that the Petitioners in the second case were bound by the finding of monopolization in the first case and despite the fact that the trial court refused to submit any antitrust law violation issue to the second jury at all. Hence, on its face and in the most irremediably harmful way, the instruction violated Federal Rule of Civil Procedure 49 which limits the judge, when a case is submitted by the special verdict method as this one was, to giving "to the jury such explanation and instruction concerning the matters submitted as may be necessary to enable the jury to make its findings upon each issue."

The instruction complained about was further grossly and patently erroneous because there had, up until the time that the charge was given, never been any pleading, proof or contention that the state court suits filed by Alcoa, et al against Woods, et al were filed in bad faith. Further, Woods never once contended that the suits had anything to do with frustrating the extraction plant. It was, of course, obviously necessary for Alcoa, et al, to file a separate suit on each new town lot well that was drilled, because a different lessor would be involved; and in order to preserve Petitioners' attack on dual completions, the one-third — two-thirds allocation formula and drainage by Respondents through well bore separations and otherwise, it was necessary that separate suits be filed against all separate parties in interest. Readily so recognizing, Judge Singleton had determined at the first trial that the motive for filing the lawsuits was not illegal and that on the contrary, there was "probable cause for the action." *Woods Exploration & Producing Co.* v. *Aluminum Co. of America,* 284 F. Supp. 582, 594-96 (S.D. Tex. 1968), App. 23. Such findings were

not appealed by Woods, et al and became binding on the trial court at the second trial as the law of this case. *See D. C. Federation of Civic Assoc.* v. *Volpe,* 459 F.2d 1231, 1267 (D.C.Cir. 1972); *Smith* v. *Pittsburgh Gage and Supply Co.,* 323 F. Supp. 256 (W.D. Pa. 1971); *United States* v. *First National Bank and Trust Co.,* 263 F. Supp. 268 (E.D. Ky. 1967).

The second trial judge had himself at all times recognized that the suits were based on probable cause and were filed in good faith up until the very time that he gave the highly prejudicial instruction in issue. At the Pre-trial Conference of May 31, 1972, in speaking of the Texas Supreme Court decisions in this litigation, which were ultimately adverse to Petitioners, Justice Clark said:

> "I'm amazed that you weren't able to * * * redress it. I had always taken the position — I guess I am going to have to change some of my language — I had always taken the position where there was a wrong done, well, there had to be a remedy, and apparently, the Supreme Court held that this was not a wrong, I suppose; but certainly there was an injury and if you have an injury, why, it looks like you would have a remedy."

He further referred to the Texas Supreme Court decisions by saying:

> "The opinions do read somewhat fantastic in regard to holding that while this was drainage, it was not their property * * * why, still there is no right." (Court of Appeals Appendix, *supra,* 185).

Later, in the same hearing, he expressly agreed to a statement by Mr. Sterling of counsel for Petitioners "that no one can rightfully say that Alcoa and Crown were litigating a frivolous or harassment-type litigation, because we would win it in the Trial Court, and then, we would win it in the Court of Civil Appeals, and then, we would lose it in the

Supreme Court, so there are lots of Judges here in Texas thought there was something to our suit. We just kept missing with the last nine.

> THE COURT: Certainly was something to it, no question about that." (Court of Appeals Appendix, *supra,* 189).

Justice Clark excluded the complete pleadings and the details of the lawsuits when Petitioners sought to introduce them on the ground that it would be "encumbering the record" and that there was no issue as to the lawsuits being filed in good faith and ultimately admitted the pleadings in the lawsuits for the sole purpose of showing the filing dates thereon. Despite all of this background of his own making, and despite the fact that he was refusing to submit any issue of antitrust violation to the jury on the ground that such had already been determined and foreclosed by the first jury verdict— being the only issue to which such instruction could be in the least relevant, Justice Clark nevertheless, over Petitioners' strenuous objections, charged the jury that if Petitioners combined to file these lawsuits "to harass and deter competition in furtherance of their monopoly" that such lawsuits could "become constituent elements of an unlawful scheme."

Even if there was a special issue being submitted to the jury to which the instruction could be relevant, and even if the record background did not preclude any issue of bad faith filing of the lawsuits, the instruction was clearly contrary to the established law as declared by this court in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961), and *United Mine Workers* v. *Pennington,* 381 U.S. 657 (1965). The Fifth Circuit has clearly itself since so recognized in its decision in *House-*

hold Goods Carriers' Bureau v. *Terrell,* 452 F.2d 152 (5th Cir. 1971).

Apparently, the trial court sought to justify the instruction under *California Motor Transport* v. *Trucking Unlimited,* 404 U.S. 508 (1972), which cannot be properly regarded as governing, because there was evidence and fact findings there that there was a combination to "harass and deter Respondents in their use of administrative and judicial proceedings so as to deny them — free and unlimited access — to these tribunals" and that in effect the tribunals were "effectively closed" to Respondents. On the contrary, the uncontroverted evidence in this case is that all tribunals have been completely accessible to the Woods Respondents and that, indeed, they have, up to now, uniformly prevailed in them. *See* the three Texas Supreme Court opinions published in the Appendix.

However, it is totally incredible that it would even be suggested that an issue of bad faith on the part of Petitioners in prosecuting this litigation could be said to exist on the record of this case to warrant the submission of the instruction and issue when, admittedly, Petitioners would have prevailed in their attack on the validity of the one-third — two-thirds allocation formula under the *Shell* and *Normanna* cases by the Texas Supreme Court, *supra,* except for the fact that they were held cut off by *laches* from attacking the formula. Surely, it cannot be rationally held that a combination to abuse the processes of the court by bad faith filings existed when Petitioners prevailed in the trial courts and in the intermediate appellate courts and when three of the nine justices dissented in the ultimate Supreme Court decision in 1966, Justice Hamilton stating in his dissenting opinion that:

> "The Court's opinion graphically sets out the mass confiscation of property and the gross injustice that results from the enforcement of Rule 31 prior to the amendment that is under attack here."

It is simply beyond any rational denial that the litigation pursued by Petitioners in the state court was merely in a good faith desperate effort to obtain their 'fair share' of the gas in the common reservoirs and to seek to reduce their continued pillage by the Respondents under the comprehensive regulatory scheme set up by the Texas statutes governing the drilling for and production and allocation of oil and gas. The instruction was simply, in any event, a gross violation of the basic principles of the *Noerr* and *Pennington* decisions.

V.

The Totality of the Second Trial Judge's Rulings Denied Petitioners a Fair Trial and Due Process of Law.

Reversing virtually all of his initial Pre-trial Conference positions, the second trial judge (1) entered a separate final judgment on a single segment of what had to be held a single cause of action in order to avoid the four-year limitations bar of Section 4(b) of the Clayton Act; (2) after fragmenting what had been held to be a single cause of action into three splinters, nevertheless, bound the Petitioners in the trial of the second or extraction plant segment of the single cause of action with the finding of unlawful Section 2 Sherman Act monopoly made by the first jury and refused to try liability or antitrust violation issues before the second jury; (3) totally without precedential support twice read the adverse jury verdict in the first

trial to the jury in the second trial and permitted counsel for Respondents to flaunt it before the second jury continuously; (4) though subjecting Petitioners to two separate judgments based on two separate jury verdicts and two separate trials of a single cause of action, nevertheless, prohibited Petitioners before either jury from developing the most probative and weighty evidence in existence on Section 2 Sherman Act conspiracy and on damages, i.e., the undisputed and adjudicated drainage and confiscation of vast amounts of Petitioners' gas by Respondents so that their total production from wells on a miniscule percentage of the total acreage exceeded that of Petitioners in the gas field of which Petitioners were held to have acquired a Section 2 Sherman Act monopoly; and (5) erroneously and with patently devastating damage to Petitioners, intructed the jury that the filing of state court lawsuits to protect their gas reserves from drainage and confiscation could constitute illegal antitrust violations by Petitioners though no issue of antitrust violation was being submitted to the jury and the jury was being charged, instead, that the Petitioners were guilty of a violation of the antitrust laws on the basis of the prior verdict and judgment which was not then even final. The totality of these rulings necessarily denied Petitioners that fair trial and that due process of law of their entire case as one lawsuit before one jury with all of the probative admissible evidence fairly and fully presented which is guaranteed to them by the Fifth and the Seventh Amendments to the Constitution of the United States.

The totality of the conduct of the second trial was clearly such as to convey unmistakably to the jury the opinion of the judge that the Petitioners are law violators and that the verdict should be returned against them.[4] In addition

[4] *United States* v. *Standard Oil Co.*, 316 F.2d 884 (7th Cir. 1963).

to the major grave errors already specified, the second trial judge excluded the highly relevant and material testimony of Ralph Queen, Petitioners' handwriting expert, and his supporting exhibits which would have been to the effect that the alleged contract between the Respondent Southeastern and Lumar, principally relied upon by Respondent at the first trial and still sponsored and relied upon by it at the second trial, contained "crude, amateurish forgeries" of the signatures of Wolcott and Williams as the officers purporting to sign the contract on behalf of Lumar. It was the alleged frustration of this contract which was a forgery out of which the pipeline and the extraction plant splinters of the case upon which the two judgments are based arose. The second trial judge characteristically initially stated that he thought this evidence was "highly relevant" (Court of Appeals Appendix, *supra,* 201) and later commented concerning this forgery:

> "THE COURT: The only thing I was going by was those new issues in the case that were not submitted to the old jury, and the new issues do involve credibility of witnesses, and here that jury found that this was not signed by Mr. Wolcott on his claim, that it was a forgery. *The jury wouldn't know that just reading the answers to the questions. They would just say, well, maybe something else, whether they claim the forgery, it just appears to me in fairness to the Defendants that they ought to be able to bring that out on the credibility of your people in regard to the subsequent oral agreement.*" (Emphasis Supplied) (Court of Appeals Appendix, *supra,* 206).

Despite this clear exposition of why this highly cogent impeachment testimony should have been permitted, the trial court, nevertheless, ultimately excluded it. (Court of Appeals Appendix, *supra,* 150-173). This is but another

example of numerous highly prejudicial and erroneous rulings in the second trial which did Petitioners irreparable damage. But we must be selective. We cannot go on indefinitely.

CONCLUSION

This case has been wrongly decided. Petitioners are saddled with two judgments which, with attorneys' fees and interest, exceed $2 million as a judicial windfall to a gas looter who had already expropriated, as twice found by the Supreme Court of Texas, millions of dollars of Petitioners' gas with legal impunity. Not only had the Woods' solely-owned companies escaped the normal legal consequences of appropriating and converting the property of another, but judicial imprimatur has been placed upon it by additionally rewarding him millions of dollars of damages never sustained.

More imortant however, to this Honorable Court for determining the question of review is the grave public question of gross misuse of a prior jury's verdict to deny a fair trial before a second jury. From the moment the trial judge read the first verdict to the jury on their impaneling, Petitioners never had a chance to receive a fair trial. The second trial judge fully understood this, for he so stated it at the Pre-trial Conference of October 30, 1972 as follows:

> "But the thing that disturbs me is, you see, it would be irretrievable if I were to instruct the jury that they had this judgment against them, and I don't want to do that, not unless I'm certain about it, because that would be such an irreparable damage that you couldn't correct it." (Court of Appeals Appendix, *supra*, 197).

It was, indeed, such "an irreparable damage" and the trial judge not only "couldn't correct it," but he made no attempt to correct it.

The imporant question to the jurisprudence of the United States and proper judicial administration is further the fragmentation of a single cause of action into splinters and the entry of a partial final judgment on one of them in clear violation of Federal Rule of Civil Procedure 54 and the resulting judicial maladministration of having two judgments based upon two jury verdicts returned in two separate trials in a suit on a single cause of action. This gross anachronism invites judicial malfunctioning in the future that should be corrected.

The invited prospects of procedural distortions which bind a Defendant by a jury finding of law violation in a prior trial in the course of subsequent multiple trials of multiple splinters of the single cause of action should be removed in the interest of sound jurisprudence. This is particularly true when the resulting distortions of piecemeal trials of a single cause of action result in the most probative and significant evidence in existence being excluded from jury consideration in any trial and a party thereby deprived of his Fifth and Seventh Amendment rights to a fair trial before one jury on his whole case.

The case further cries for review to preclude like future monstrosities when the deadly impeachment evidence of forgery directed at the claimant's credibility is excluded from use on the ground that the issue was adjudicated in the first of the multiple trials of the splintered single cause of action, while, at the same time, the jury in the subsequent trial is instructed that it may consider a combination to institute litigation by the Defendants as evidence of antitrust violation even though any issue of determining antitrust violation has been excluded from and denied to the jury being instructed, particularly when such instruction is in gross violation of Federal Rule of Civil Procedure 49 governing the submission of a case to the jury by the special verdict method.

Shocking injustice in the individual case has resulted from gross and unprecedented violations of judicial procedures with consequent violations of Constitutional guarantees. Review is merited and should be accorded.

The petition should be granted, the judgment of the Court of Appeals be reversed and the entire case be remanded to the trial court for a single new trial on the whole case. Despite the long delays such a full trial of the whole case before a jury has not yet been had.

Respectfully submitted,

LEROY JEFFERS
First City National Bank Building
Houston, Texas 77002
Attorney for Petitioners Aluminum Company of America, Crown Central Petroleum Corporation, Lavaca Pipeline Company

Of Counsel:

ROSS N. STERLING
CHARLES T. NEWTON, JR.
DAVID T. HEDGES, JR.
VINSON, ELKINS, SEARLS, CONNALLY & SMITH
First City National Bank Building
Houston, Texas 77002

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 33, paragraph 1, of this Court, three copies of the foregoing Petition for Writ of Certiorari and separate Appendix thereto were served upon Counsel for Respondents by placing the same in the United States mail, first class postage prepaid addressed to counsel of record for Respondents at his post office address of record this 3rd day of June, 1975, thus serving all parties required to be served.

LEROY JEFFERS
First City National Bank Bldg.
Houston, Texas 77002
Counsel for Petitioners

SUPPLEMENT

FIRST VERDICT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

WOODS EXPLORATION & PRODUCING CO., INC., ET AL.,

v.

ALUMINUM COMPANY OF AMERICA, ET AL.

CIVIL ACTION NO. 14,669

VERDICT

In connection with your deliberations of the following questions, you are instructed that plaintiffs have the burden of proof.

Question No. One

Did defendants Aloca and Crown enter into an illegal contract, combination, or conspiracy to unduly and unreasonably restrain the trade or commerce of drilling for, producing, and transporting gas from the Appling Field?

Answer this question either "Yes" or "No."

Answer: No.

Question No. Two

Did Alcoa and Crown monopolize or attempt to monopolize or conspire with F. E. Appling, Carl E. Siegesmund, or Houston Pipe Line Company, or any one of them, or either

of them, to monopolize any appreciable part of the trade and commerce of drilling for, producing, and transporting gas from the Appling Field?

Answer this question either "Yes" or "No."

Answer: Yes.

If you have answered Question Nos. One and Two "No," then you need not answer any of the following questions, but if you have answered Questions No. One "Yes" or Question Two "Yes," or answered both Questions One and Two "Yes," then you will answer the following questions.

If you have answered Question Nos. One and Two "Yes," or either of them "Yes," then you will answer the following question:

Question No. Three

3(a) As a result of such illegal contract, combination, or conspiracy, or as a result of a monopoly, or an attempt to monopolize, or conspiracy to monopolize inquired about in Questions Nos. One and Two, did Alcoa and Crown refuse to deal with Stanley C. Woods, individually, or Woods Exploration and Producing Company?

Answer this question either "Yes" or "No."

Answer: Yes.

3(b) As a result of such illegal contract, combination, or conspiracy, or as a result of a monopoly, or an attempt to monopolize, or conspiracy to monopolize inquired about in Questions Nos. One and Two, did Alcoa or Crown employ

the surveying partnership of Joehnston & Ford to make an incorrect survey of the Carancahua townsite property.

Answer this question either "Yes" or "No."

Answer: No.

3(c) As a result of such illegal contract, combination, or conspiracy, or as a result of a monopoly, or an attempt to monopolize, or conspiracy to monopolize inquired about in Questions Nos. One and Two, did Alcoa or Crown harass or interefere with the operation of Woods Exploration & Producing Company in the drilling of wells on the townsite lots in the Appling Field.

Answer this question either "Yes" or "No."

Answer: Yes.

Question No. Four

Did Fred A. Wolcott sign plaintiff's Exhibit No. 85A?

Answer this question either 'Yes" or "No."

Answer: No.

If you have answered Questions Nos. One and Two "Yes," or either of them "Yes," and if you have answered Question No. Four "No," then you will answer the following question:

Question No. Five

As a result of such illegal contract, combination, or conspiracy, or as a result of a monopoly, or conspiracy to monopolize inquired about in Questions Nos. One and Two, did defendants, acting together with F. E. Appling, prevent Fred Wolcott from signing plaintiff's Exhibit No. 85A?

Answer this question either "Yes" or "No."

Answer: Yes.

If you have answered Questions Nos. One and Two "Yes," or either of them "Yes," and if you have answered Question No. Four "No," then you will answer the following question:

Question No. 6

As a result of such illegal contract, combination or conspiracy, or as a result of a monopoly, or an attempt to monopolize, or conspiracy to monopolize inquired about in Questions Nos. One and Two, did defendants, acting together with F. E. Appling, prevent any other authorized representative of Lumar Gas Corporation, from entering into an agreement with plaintiffs Southeastern Pipeline Company, Stanley C. Woods, or Woods Exploration & Producing Company relating to the transportation of plaintiffs' gas from the Appling Field?

Answer this question either "Yes" or "No."

Answer: No.

Question No. Seven

What sum of money, if any, would fairly and reasonably compensate plaintiff Southeastern Pipeline Company for the damages, if any, sustained by it to the date on which this trial began, December 2, 1968, which damages, if any, were proximately caused by the illegal combination or conspiracy, or the illegal monopoly, or attempt to monopolize, or conspiracy to monopolize, if any?

If you have answered Questions Nos. 4, 5 and 6, "No," then in connection with your answer to this Question No. Seven relating to damages, if any, you are not to take into consideration in connection with your deliberations of

damages, if any, to Southeastern Pipeline Company, any testimony or evidence relating to the building by Southeastern Pipeline Company of a gas transmission pipeline from the Appling Field to connect with the Tennessee Gas Transmission line, or the cost of any such line.

Answer this Question No. Seven by stating the amount in dollars and cents.

Answer: $142,759.00

"1) Loss of pipe purchased & not used = $4,059."

"2) 6 wks. loss production on 16,000 mcf/day at 11 cents/mcf gross divided by 2 for net = $79,200."*

"3) Loss of building 2nd pipeline $99,100."

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* At the time the verdict was accepted by the court the foreman of the jury clarified that the figure should be $39,600. (Tr. 3343-44).

Question No. Eight

What sum of money, if any, would fairly and reasonably compensate Woods Exploration & Producing Company for the damages, if any, sustained by it to the date on which this trial began, December 2, 1968, which damages, if any, were proximately caused by the illegal combination or conspiracy or the illegal monopoly, or attempt to monopolize, or conspiracy to monopolize, if any?

If you have answered Question 3(a) "No," then in connection with your deliberations concerning this question No. Eight, you will not take into consideration any testimony or evidence relating to the failure on the part of Alcoa and Crown to deal with Stanley C. Woods, individually, or Woods Exploration & Producing Company concerning the transportation of gas out of the Appling Field.

If you have answered Question 3(b) "No," then in connection with your deliberations concerning this Question No. Eight, you will not take into consideration any testimony or evidence relating to an incorrect survey or conflict in surveys in connection with your assessment of damages, if any, to Woods Exploration & Producing Company.

If you have answered Question 3(c) "No," then in connection with your deliberations concerning this Question No. Eight, you will not take into consideration any testimony or evidence relating to any harassment or interference with the operations of Woods Exploration & Producing Company in the Appling Field in connection with your assessment of damages, if any, to Woods Exploration & Producing Company.

You will answer this Question No. Eight by stating the amount in dollars and cents.

Answer: $500.00.

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Date Foreman of the Jury

SECOND VERDICT

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

WOODS EXPLORATION & PRODUCING CO., INC., ET AL.,

v.

ALUMINUM COMPANY OF AMERICA, ET AL.

VERDICT

Question No. One

Do you find from a preponderance of the evidence that the plaintiff Southeastern Pipeline Company in September and October, 1960, had both the intention and the preparedness to participate in the necessary investment for the construction and operation of an extraction plant on Lumar Gas Corporation's pipeline and to share in the profits, if any, therefrom, which intention and preparedness included an agreement, as above defined, with Lumar Gas Corporation that such extraction plant would in fact be built?

Answer this question "Yes" or "No." Answer: Yes.

If you answer this question "No," then you need not answer the following questions.

If you answer this question "Yes," then proceed to answer the following issue.

Question No. Two

Do you find from a preponderance of the evidence that any wrongful actions of the defendants were the direct and

proximate cause of frustrating the agreement between plaintiff Southeastern Pipeline Company and Lumar Gas Corporation, if any you have found, and of preventing the construction and operation of an extraction plant on the Lumar gas pipeline by Lumar and Southeastern?

Answer this question "Yes" or "No." Answer: Yes.

If you answer this question "No," then you need not answer any further questions.

If you answer this question "Yes," then answer the following question.

Question No. Three

Do you find from a preponderance of the evidence that the plaintiff Southeastern Pipeline Company was injured in its business or property by the frustration of said agreement and the prevention of the building and operation of such plant, if any you have found?

Answer this question "Yes" or "No." Answer: Yes.

If you answer the foregoing question "No," then you need not answer the following question.

If you have answered the foregoing question "Yes," then answer the following question.

Question No. Four

What amount of money, if any, do you find from a preponderance of the evidence is required if paid now to compensate plaintiff Southeastern Pipe Line Company for the actual damages, if any, sustained by it by reason of any such injuries to its business or property?

Answer in dollars and cents. $352,223.04

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Date Foreman